Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1993

PATRICIA REILLY, *Petitioner*,

v.

ABBEY & ELLIS, ET AL.;
and TUCSON ELECTRIC POWER, *Respondents*,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the settlement notice that was given to the class shareholders in a securities class action lawsuit complied with the requirements of due process in adequately informing the shareholders of the terms of the lawsuit and the proposed settlement offer.

LIST OF PARTIES

In the Lower Court Proceedings of

In re: Tucson Electric Power Company Securities Litigation

Torrisi v. Tucson Electric Power Company

No. 92-15550, 92-15556, 92-15557

PETITIONER

Patricia Reilly

RESPONDENT SHAREHOLDER LAW FIRMS

1) Abbey & Ellis, Co-Lead Counsel

2) Milberg Weiss Bershad Specthrie & Lerach

3) Berger & Montague, P.C.

4) Richard Appleby, Esq.

5) Barrack, Rodos & Baccine

6) Berman DeValerio & Pease

7) Bernstein Litowitz Berger & Grossman

8) David B. Gold, Esq.

9) Goodkind Labaton Rudoff & Sucharow

10) Harvey Greenfield, Esq. (continued)

RESPONDENT SHAREHOLDER LAW FIRMS (continued)

11) Greenfield & Chimicles

12) Gross & Metzger

13) Alvin J. Ivers, P.C.

14) North & Barron

15) O'Connor, Cavanagh, Anderson, Westover, et al.

16) I. Stephen Rabin, Esq.

17) Savett, Frutkin, Podell & Ryan, P.C.

18) Schiffrin & Craig

19) Simon & Campbell, P.C.

20) Strauss & Troy

21) Curtis V. Trinko

22) Wolf Popper Ross Wolf & Jones

23) Zlotnick & Thomas

24) Zwerling, Schachter & Zwerling

25) Bonnett, Fairbourn & Friedman, P.C.

26) Lowey, Dannenberg Bemporad Brachtl & Selinger

27) Stull, Stull & Brody (continued)

RESPONDENT SHAREHOLDER LAW FIRMS (continued)

28) Wolf Haldenstein Alder Freeman & Herz

29) Hartunian, Futterman & Howard, Chtd

30) Kaufman Malchman Kaufmann & Kirby

31) Leonard, Felker, Altfield, Nix & Krigbaum

32) Meredith & Cohen, P.C.

33) Much Shelist Freed Deneberg & Ament, P.C.

34) Sears & Goodman, P.C.

35) Wechsler Skirnick Harwood Halebian & Feffer

RESPONDENT COMPANY

Tucson Electric Power Company

PARTY WHO WAS INVOLVED IN THE PROCEEDING IN BELOW

James Lazar, Appellant Shareholder

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

PATRICIA REILLY, *Petitioner*,

v

Abbey & Ellis, et al.;

and Tucson Electric Power Company, *Respondents*,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Patricia Reilly, a member of the shareholder class and Petitioner in this litigation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, 1a-20a) is reported at 8 F. 3d 1370. The Final Judgment of the District Court,

filed with the Clerk of the Court on February 19, 1992, (App., infra, 21a-27a) and the Order Re: Attorney's Fees (App., infra, 28a-29a) are unreported.

JURISDICTION

The Court of Appeals filed on December 10, 1993, its denial of Appellant's Petition for a Rehearing of its judgment affirming the District Court's ruling (App., infra 30a-31a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Federal Rules of Civil Procedure 23(c)(2) requires that "the court shall direct to the members of the class the best notice practicable under the circumstances".

STATEMENT

From March 27, 1989, to July 18, 1989, Petitioner Reilly made 3 purchases of Tucson Electric Power (TEP) common stock.

Reilly's total investment in TEP stock was $10,677. On Dec. 4, 1989, Reilly sold all of her shares of TEP for $5,081. She realized a loss of approximately $5,600.

In January, 1992, Reilly received the *"NOTICE OF PENDENCY AND PROPOSED SETTLEMENT OF CLASS ACTIONS AND SETTLEMENT HEARINGS THEREON"* (Relevant portions of *Notice*, App., infra, 32a-33a. For complete Notice refer to U.S. District Court docket entry #194, dated 12/11/91). The purpose of the notice was to inform shareholders who had purchased TEP shares between March 23, 1987 and January 25, 1991, that a lawsuit had been filed alleging fraud and violations of various state and federal securities laws by TEP, and its officers and directors, which resulted in these TEP shareholders losing money on their stock investments. This notice was the first and only information sent to the TEP shareholders telling them of the lawsuit.

The notice also stated that a settlement offer had been reached in this lawsuit, which, if approved, would result in establishing a $30,000,000 settlement fund for these shareholders.

The notice did ***not*** tell a shareholder how much of his losses would be recovered out of the $30,000,000, but the notice did say that the settlement "**confers *substantial benefits* to the Settlement Class and *each of its members***". (App., infra, 32a) The notice stated that the shareholders' attorneys were requesting $9,000,000, as legal fees, plus expenses, from the $30,000,000 settlement fund. Furthermore, the notice stated that if a shareholder did not opt out of the class, and the settlement were approved, then the shareholder would be permanently bound by the settlement and any claims the shareholder had against the defendants would be dismissed with prejudice. The notice also included the claim form on which an investor was to provide his stock market losses.

Basically, shareholder Reilly was asked to approve or disapprove the terms of the settlement, or to opt out of the class entirely. In order to make that decision, Reilly wanted to know how much of her $5,600 loss would be recovered from the $30,000,000 settlement fund. To a shareholder the most important fact is how much of his losses will be recovered. It is irrelevant to a shareholder what the total amount of the settlement fund is.

In an attempt to determine how much she would recover, Reilly telephoned Tucson Electric Power. Tucson Electric told Reilly to call Heffler & Co., the accounting firm that had been selected by the shareholders' attorneys to tabulate and administer the claim forms in this case. Heffler & Co. is regularly selected by shareholders' attorneys as the claims administrator of securities class action settlements. Reilly called Heffler & Co. and spoke with the accountant who was handling the TEP case. The accountant told Reilly that in the case of TEP, he did not know what percent a shareholder would recover of his losses; but that in the vast majority of securities class action settlements, the shareholder recovers less than 10% of his losses. On two separate occasions, shareholder Reilly spoke with two other accountants at Heffler & Co. regarding securities class action settlements. These two other accountants confirmed that in the vast majority of cases, the shareholders recover less than 10% of their losses. The accountant who was handling the TEP case suggested that Reilly contact Gary Cantor, of Berger & Montague, one of the lead

counsel representing the TEP shareholders, to determine how much of her losses would be recovered.

Reilly telephoned Mr. Cantor. She told him that she was a TEP shareholder and she was trying to see if anyone had calculated the total dollar amount of the claimed losses to the shareholders in order to compare that figure with the $30,000,000 settlement. He said that the total losses were a nine figure number - somewhere between $200,000,000 and $400,000,000. Reilly asked Mr. Cantor if he knew what the shareholders might recover. He said it would be close to $.04 to $.05 on the dollar of their losses. Mr. Cantor told Reilly that her settlement check would not be the biggest check she had ever gotten in her life. At a recovery rate of $.05 on the $1.00, Reilly could expect to recover $280 of her $5,600 loss.

Reilly sent a letter to the District Court Judge who would be conducting the settlement hearing. Reilly related to the court the results of her telephone conversations with both the accountants at Heffler & Co., and Mr. Cantor. Reilly also told the court of the results of a study done by Vincent O'Brien who studied 332 securities class action lawsuits filed from April, 1988,

to June, 1991. Mr. O'Brien found that 93% of these cases settled and that the average recovery to the stockholder was 6% of their losses. Reilly also included with the letter a copy of a law review article "*Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stanford Law Review 497, by Professor Janet Cooper Alexander, of Stanford Law School. Reilly's letter stated her objection to the settlement on the grounds that the shareholders should have been informed of how little they would recover of their losses before asking them to approve or disapprove of the terms of the settlement, or to elect to opt out of the class. Reilly stated that withholding this information was a material fact and resulted in a denial of due process to the shareholders. Further, Reilly stated that the shareholders were actually misled by the notice into believing that they would recover a "**substantial**" amount of their losses if they approved the settlement.

Reilly also objected to the request for $9,000,000 in attorneys' fees, plus expenses. Prior to the settlement hearing, the shareholders' attorneys submitted documentation of their hourly

legal fees and expenses to justify their request for $9,000,000 in legal fees, plus expenses. (Summary of legal fees and expenses of shareholders' attorneys, App., infra, 34a-36a. For itemized legal fees and expenses for each law firm representing the shareholders, refer to U. S. District Court docket entries #197 and #199, dated 2/18/92.) Their filings showed that the total hours worked by the shareholders' attorneys were 10,741.20 hours. The total cost of all the hours billed was a little under $3,000,000 ($2,945,124 to be exact). Their expenses were an additional $344,799.15. There were 177 lawyers and 77 paralegals/law clerks from 35 law firms representing the shareholders. 14 lawyers charged between $400 and $500 an hour. In addition to these listed fees and expenses, the lawyers were asking for an additional $6,000,000. The shareholders' lawyers were asking to be paid over $9,000,000 for work they did in reaching a settlement which would result in the shareholders recovering 5% of their losses. No wonder the notice did not state what the shareholders could expect to recover of their losses out of this settlement.

On **February 19, 1992, one day before the settlement hearing**, the District Court filed its Final Judgment and Dismissal approving the settlement with the Clerk of the U.S. District Court. (See Clerk of the Court date stamp, App., infra, 21a.) On **February 20, 1992**, the District Court held the settlement hearing. Reilly flew to the settlement hearing to make her objections in person to the court. The settlement hearing started at 10:00 a.m. and was over by 10:15 a.m. During this 15 minutes, the court had time to hear from shareholders who were opposed to the settlement, to listen to the shareholders' attorneys justification for the settlement and their claim for $9,000,000 in legal fees, and for the court to issue its decision, with supporting reasons, to approve the $30,000,000 settlement and to award $7,500,000 in attorneys' fees. The $7,500,000 in fees, which amounted to a $4,500,000 bonus above their $3,000,000 in billings, was to be paid out of the $30,000,000 settlement fund, leaving the remainder for the shareholders.

It was not the notice that prompted shareholder Reilly to try to determine what percentage of her losses would be recovered.

On the contrary, based on the notice, a shareholder would expect to recover a substantial amount of his losses, and as such, would not investigate further. What prompted Reilly, was that two years previously, she had been part of another securities class action lawsuit. This lawsuit was against Pace Membership Warehouse, its officers and directors. In Pace, the notice to the shareholders stated that there was a $9,125,000 settlement, and that the lawyers were asking for 40% of the settlement fund. Similar to the TEP case, the notice stated that all the settlement funds would come from insurance proceeds. After living through the disappointment of the Pace investment, shareholder Reilly felt that paying 40% of a settlement as legal fees was outrageous. As such, Reilly, at her own expense, flew to the Pace settlement hearing to object to the excessive legal fees. As a result of the Pace settlement hearing and conversations with the claims administrator, who happened to be Heffler & Co., Reilly came to realize that the shareholders recover little of their losses in securities class action lawsuits. In Pace, the shareholders recovered 17% of their losses. Reilly was told by the

accountants at Heffler & Co. that a recovery of 17% of losses was a large recovery and much above the average recovery.

It was becoming clearly evident that Tucson Electric was fitting the pattern of what has been described by some as "legal extortion" by securities class action attorneys. Basically, the modus operandi is that a lawsuit gets filed alleging fraud by a company's officer and directors, which under the securities laws, if found to be true, would hold defrauding officers and directors **personally** liable of the judgment. Inevitably a settlement is offered by the shareholders' attorneys which is too good for the defendants to refuse. The settlements offers are, on average, only 6% of the defendants' potential liability. Furthermore, the defendant officer and directors do not pay anything as the settlement money comes from insurance proceeds. Of course, the insurance premiums are paid by the company, and therefore in effect, by the shareholders. If there was fraud, which the shareholders' attorneys allege, but the defendants deny; the officers and directors are not held accountable. Meanwhile, as a result of the settlement, but unbeknownst to the shareholders at the time, the

shareholders will recover a pittance of their losses, while the shareholders' attorneys will walk away with millions in legal fees. These lawsuits are filed merely to enrich the shareholders' attorneys. There is no justice for the shareholders, as the shareholders do not recover their losses, nor do they see the guilty parties held responsible for their acts.

On March 19, 1992, Reilly filed an appeal of the District Court's ruling as to the settlement and award of attorneys' fees. Reilly's basis for appeal was that the notice should have informed the shareholders of the expected percentage of recovery of their losses. This fact was material and its omission resulted in a denial of due process. Furthermore, the notice was actually deceptive and fraudulent in that it promised the shareholders that if they approved the settlement that it would result in a **substantial benefit** to **each** shareholder. The implication made by the shareholders' attorneys was that if a shareholder agreed to this settlement, the shareholder would recover a large percentage of his losses. The reason for the fraudulent inducement by the attorneys was so that they would be awarded millions in legal fees, which would otherwise be at risk if

they had to proceed with the case.

The Court of Appeals sent the case back to the District Court to see if the appeal could be settled. Shareholder Reilly wrote a letter to the new settlement judge stating the above facts and her position that the shareholders should have been told what their expected percentage recovery would be, and of the conflict of interest between the shareholders' attorneys and the shareholders. Further, Reilly stated that these missing facts resulted in a denial of due process to the shareholders. A preliminary settlement conference was held between the new district court settling judge, the Appellant shareholders and their attorneys. The shareholders' attorneys refused to re-write the notice and provide full disclosure to the shareholders. As such, the case was sent back to the U.S. Court of Appeals.

On November 3, 1993, the U.S. Court of Appeals for the Ninth Circuit affirmed the District Court judgment approving the settlement and the award of $7,500,000 in legal fees. The Court of Appeals held that under ***Marshall v. Holiday Magic, Inc.***, 550 F2d

1173 (9th Cir. 1977), all that due process required was that the notice give the aggregate amount of the proposed settlement and the formula for computing recoveries. According to the Court of Appeals, in the TEP case, "the settlement notice states that the aggregate amount of the settlement is $30 million. It also stated that each class member's recovery will be proportional to 'Recognized Loss,' which it defines as 100% of losses resulting from stock bought during the first period ending July 18, 1989, and 25% of losses resulting from stock bought during the second period. The notice clearly stated the aggregate amount of the settlement and the formula for computing awards. The notice was adequate under ***Holiday Magic***."

There is no way, from the notice in the present case, that a shareholder can determine how much of his losses will be recovered. Furthermore, the notice, as drafted by the shareholders' attorneys, gives the fraudulent assurance that whatever the recovery amount is that it will be **substantial**.

Appellant Reilly requested for a rehearing and a re-examination of its holding that the minimum notice criteria

established by ***Marshall v. Holiday Magic, Inc.***, 550 F2d 1173 (9th Cir. 1977), was adequate and should be applied in the TEP case. On December 10, 1993, the Court of Appeals filed a denial of Appellants Reilly's petition for a rehearing.

REASONS FOR GRANTING THE PETITION

All that shareholder Reilly has asked is that the notice that is sent to the shareholders be complete and accurate. Then, after giving the shareholders all the pertinent facts, let them decide. How can the court ask a shareholder to make a decision by which he will be permanently bound without giving the shareholder the information which is vital and necessary to him in his decision-making process?

The Court of Appeals held that the requirements of due process were satisfied in this case because a shareholder knew the total amount of the settlement fund, i.e. $30,000,000, and the formula for computing his claim, i.e. listing his stock market losses and multiplying this figure by either 100% or 25%, depending

upon the class to which he belonged. The Court held that this was the standard established under ***Holiday Magic***. Of note is the fact that the court did not cite any other cases regarding the adequacy of notice. This is because the only case which has dealt with the issue of the adequacy of the **contents** of the notice was ***Holiday Magic,*** and ***Holiday Magic*** was not a securities class action lawsuit. The cases normally address the issue of how the notice was sent, i.e. the timing of the mailing, or whether the notice was sent by first class mail v. publication, etc. It does not appear, other than in ***Holiday Magic***, that the issue has been raised as to the adequacy and sufficiency of what is **in** the notice. And because ***Holiday Magic*** is clearly distinguishable from the present case, ***Holiday Magic***'s ruling should not apply in this case.

In ***Holiday Magic***, the class consisted of the distributors of products of Holiday Magic. The distributors were suing Holiday Magic. A settlement was reached between the distributors and Holiday Magic. The settlement only gave the total amount of the settlement and the formula for computing claims. The court held this was sufficient notice. However, distributors of a company's

products are much different than shareholders of a public company. A distributorship is an **active** business for the distributor. The distributors are involved with the company and the other distributors, in many cases on a daily basis. The distributors give feedback to a company about its product and its marketing support. The distributors talk to each other. They get together at sales meetings which are put on by the company for the distributors. Oftentimes, the company will send out newsletters to the distributors. There is an unofficial pipeline of gossip and information between the distributors about the company. Even if the notice in ***Holiday Magic*** did not state what the exact percentage recovery would be to the distributors, there existed an informal system by which the distributors could talk to each other about the settlement and determine the adequacy of the settlement offer.

Nothing similar to this exists for shareholders of a public company. Shareholders are **passive** investors. Oftentimes a shareholders' actions are limited to buying the stock, watching it in the newspaper, and sometimes selling it. Normally, the only

communication from the company is the annual report and the notification of the annual meeting. There is no interchange or communication between a shareholder and the company or other shareholders. Shareholders are absolute strangers to each other. A shareholders does not know any of the other shareholders, let alone know how to reach them. In fact, a company will not disclose the names of its shareholders. In the TEP case, the **only** information that a shareholder had as to the lawsuit and the adequacy of the settlement offer was the notice. As such, the notice to the shareholder needed to contain **everything** which would be **relevant** to his decision. The notice needed to be not only accurate, but also to not contain misleading and deceptive statements that would induce approval of the settlement, i.e. that the settlement would be **substantial** to **each** shareholder.

The Court of Appeals in this case held that shareholders' attorneys have stated at various times that they do not know what percent the shareholders will recover of their losses, and so they could not provide that information in the notice. This is not true. First, this contradicts what their lead counsel Gary Cantor told

shareholder Reilly. Second, the shareholder's attorneys in this case clocked over 10,000 hours of work. That would be one person working full time for more than 5 years. Yet with all this time, they say they did not calculate one of the elements of their case, i.e. damages. If the shareholders' attorneys did not determine the total market losses, how could they say that the settlement offer was fair, reasonable, and adequate? Third, according to the notice, **"(c)ounsel for the Class Plaintiffs include several law firms with extensive and particular expertise and experience in the prosecution of securities class actions."** (App., infra, 32a) Based on the vast number of securities class action lawsuits these lawyers have handled, shareholders' attorneys know full well that their clients get a pittance of their losses recovered from these class action settlements. The shareholders' attorneys are the ones that file the final accounting with the courts as to the amount of claims versus the amount of funds available in the settlement funds. They know what the average percentage of recovery that the stockholders receive out of these settlements.

With all the experience that shareholders' attorneys have in securities class action lawsuits; with all the settlements they have been involved in; and with all the requests for distributions that they have filed with the courts; it is unbelievable that they now say that they do not know what their clients can expect to get out of this case. Yet 3 different accountants at Heffler & Co. easily told shareholder Reilly on 3 different occasions that the average recovery to the shareholder is less than 10% of their losses.

The Court of Appeals discussed the financial condition of Tucson Electric to support the fairness, adequacy and reasonableness of the settlement. The court seemed to be saying that given the financial straits the company was in, what difference would it make if the notice did not adequately disclose a material fact, i.e. the expected percentage recovery of losses to the shareholders. The $30,000,000 was basically all the shareholders would get, as there was no other money available. Using this type of logic, why bother giving the shareholders **any** notice at all. With adequate and sufficient notice, i.e. a 5% recovery, the shareholders might be able to accept the limitation on available

settlement funds, but they might have required that the defrauding officers and directors be actually held accountable, and brought to public scrutiny. The shareholders might have demanded not only insurance proceeds, but also some funds from the actual pockets of the individual officers and directors. (This by the way was the purpose of the law in making the officers and directors personally liable.) Even though the funds from these individuals would not have increased the percentage recovery by much, at least the shareholders would have felt that the defrauding parties had been brought to justice. Of course what the shareholders would or would not have accepted if they were given full and complete information is projection. And that is exactly the point. Why not give all the relevant facts to the shareholders and then ask them to decide if they want to be bound by these settlement terms. This is what due process requires. The notice should list all the **material** facts which a shareholder would review to determine if he should be permanently bound by the decision. The solution is not to have a defective and deceptive notice which would result in an approval of the settlement, but rather to provide full and accurate disclosure

of all material facts, including both the poor financial condition of Tucson Electric, **and the minimal recovery of shareholder' losses**.

Shareholder Reilly's guess is that what would be at risk with a complete and correct notice is not the $30,000,000 settlement, but rather the $7,500,000 in legal fees. This gets to the heart of the matter - why was this lawsuit brought at all when it was quite apparent early in the lawsuit that Tucson Electric was in such a poor financial condition that the shareholders would not recover much of their losses? Results do not lie. Let's look at what this lawsuit produced:

1. 10,741 billable hours for the shareholders' attorneys,
2. billable hourly costs for the shareholders' attorneys of approximately $3,000,000,
3. $4,500,000 bonus above the hourly billings to total an award of $7,500,000 in attorneys' fees,
4. shareholders recover 5% of their losses,

5. alleged defrauding officer and directors do not pay anything and are not held accountable, as entire settlement funds come from insurance companies.

Shareholders' attorneys saw this an another opportunity, given their **"extensive and particular expertise and experience in the prosecution of securities class actions"**, to file a lawsuit, preying upon their clients' misfortune, in which they could extract a settlement from insurance companies which would result in their reaping millions of dollars in legal fees, while their clients' claims were sold out for pennies on the dollar.

The reason this case is so important for Supreme Court review is that Tucson Electric is not an isolated case in which the shareholders are offered a settlement in a securities class action lawsuit, in which they have no idea from the notice that is given to them, that they will recover virtually none of their losses as a result of settling, while their lawyers will make millions of dollars in legal fees.

On June 17, 1993 and July 21, 1993 the U.S. Senate Securities Subcommittee took testimony regarding securities class action litigation reform. Witnesses at the hearing included shareholder Reilly, Vincent O'Brien, Mr. Radetich of Heffler & Co., William Lerach and Melvyn Weiss (co-lead counsel in the TEP case), officers of public companies that have been sue, shareholder activist groups, and many others. Some of the facts which came out at the hearing were as follows:

1. It is very common for corporations to be sued under securities laws. 1 out of 8 companies on the New York Stock Exchange, 1 out of 18 on the American Stock Exchange, and 1 out of 20 on the over-the counter market (NASD) have been sued for securities fraud.

2. Virtually all of these lawsuits are resolved through settlement. As stated above, Mr. O'Brien found that 93% of the securities class action cases were settled out of court. He testified that this is an extremely high settlement rate as the norm for most civil cases is 60% to 70%.

3. The settlement amounts in these cases are relatively low compared to the losses. Mr. O'Brien found that, on average, the cash amount of the settlement was 6% of the total trading losses, and this was before the shareholders' attorneys' fees. A study done by economist Frederick Dunbar found that the settlement amounted to 3% of the shareholders' losses. Even the testimony of Mr. Radetich of Heffler & Co., whose firm is hired by shareholders' attorneys, showed that the average recovery to the shareholder was 11%, and this figure was inflated as it included the interest that the settlement funds earned while the claims were being processed.

4. The settlement amounts in fully 94% of the cases studied by Mr. O'Brien were equal to or less than the amount of average corporate insurance available for these types of law suits.

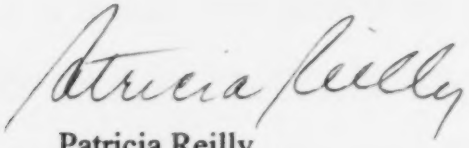
Clearly there is a problem, and it is not just in the Tucson Electric case. What is happening to the shareholders in Tucson Electric is a repeat of the abuse that has been, and is being , done to the shareholders by their attorneys in numerous other cases. The legislature is working on reform. In the meantime, the courts

should fulfill the fiduciary duty they have to protecting the interests of the shareholders. Adequate notice to the shareholders, informing them of their expected recovery, would go a long way to the courts meeting their obligation. Then after accurate and complete information is given in the notice, ask the shareholders if they approve, or want to be part, of these settlements with the scant 6% recoveries and the award of millions of dollars in legal fees.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN V. TORRISI, *Plaintiff-Appellee,* and JAMES LAZAR, *Objector-Appellant,* v. TUCSON ELECTRIC POWER COMPANY, et al., *Defendants-Appellees.*	No. 92-15550 D.C. No. CV-89-01274-WPC

In re: TUCSON ELECTRIC COMPANY SECURITIES LITIGATION. JOHN V. TORRISI, *Plaintiff-Appellee,* and JAMES LAZAR, *Objector-Appellant,* v. TUCSON ELECTRIC POWER COMPANY, et al., *Defendants-Appellees.*	No. 92-15556 D.C. No. CV-89-01274-WPC

In re: TUCSON ELECTRIC COMPANY SECURITIES LITIGATION.

JOHN V. TORRISI,
Plaintiff-Appellee,

and

PATRICIA REILLY,
Plaintiff-Appellant,

v.

TUCSON ELECTRIC POWER COMPANY; THOMAS WEIR, et al.,
Defendants-Appellees.

No. 92-15557
D.C. No. CV-89-01274-WPC
OPINION

Appeal from the United States District Court
for the District of Arizona
William P. Copple, Senior District Judge, Presiding

Argued and Submitted
August 13, 1993—San Francisco, California

Filed November 3, 1993

Before: Alex Kozinski, David R. Thompson and Thomas G. Nelson, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

Civil Litigation and Procedure/Class Actions/Settlements

The court of appeals affirmed a district court judgment. The court held that notice to a class of a proposed settlement was

timely even though some class members did not receive it until after the "opt out" date.

Purchasers of stock in appellee Tucson Electric Power Co. brought a class action against the company, alleging that they suffered losses as a result of fraud and violations of securities laws. Under the terms of a settlement agreement, the class was divided into two subclasses. The subclass consisting of class members who bought stock after July 18, 1989, was entitled to only one-fourth of the recovery allocated to those who bought stock on or before that date.

Timely notice of the proposed settlement was published and sent to 76,700 individual stockholders and 277 brokerages, banks, and institutions. Mailing to another 36,000 stockholders, however, was not completed until February 11, 1992. The notice stated the aggregate amount of the proposed settlement, and stated that each class member's recovery would be proportional to "Recognized Loss," which it defined as a percent of certain losses. The notice also advised class members that they could opt out of the class by February 6, 1992.

The district court approved the settlement, and awarded class counsel 25% of the settlement in attorney's fees. James Lazar and Patricia Reilly, two stock purchasers, appealed, contending, among other things, that (1) notice of the proposed settlement did not contain enough information to enable individual class members to calculate what they would get from the settlement, (2) the timing of the notice violated due process and Federal Rule of Civil Procedure 23(c)(2), (3) the amount of attorney's fees awarded to class counsel was excessive, and (4) the subclasses should have been separately represented by counsel.

[1] The notice clearly stated the aggregate amount of the settlement and the formula for computing awards. Thus, it was adequate under case law.

[2] The question regarding the timing of the notice was whether the class as a whole had notice adequate to flush out whatever objections might reasonably be raised to the settlement. The question was not whether some individual shareholders got adequate notice. [3] The context in which the settlement was reached was important to consider. There was a pending bankruptcy proceeding against Tucson, and it was critical that the settlement be presented to the district court promptly. [4] Thus, the timing of the notice was not inadequate.

[5] In common fund cases, the Ninth Circuit has established 25% of the fund as the "benchmark" award for attorney fees. [6] The district court did not abuse its discretion in applying the benchmark.

[7] The district court did not directly address the separate representation question, but in finding the settlement fair, adequate and reasonable, the court implicitly found that representation was adequate. [8] The opportunity to opt out can alleviate concern about potential class conflict.

COUNSEL

Daniel W. Meek, Portland, Oregon, for objector-appellant Lazar.

Patricia Reilly, Del Mar, California, pro se for objector-appellant Reilly.

Ralph L. Ellis, Abbey & Ellis, New York, New York; Melvyn I. Weiss, Milberg, Weiss, Bershad, Huynes & Lerach, New York, New York; and Stanley Wolfe, Berger & Montague, Philadelphia, Pennsylvania, for the plaintiffs-appellees.

Thomas M. Pace, O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, liaison counsel for the plaintiff.

Charles C. Platt, LeBoeuf, Lamb, Leiby & MacRae, New York, New York; and Dennis R. Nelson, Tucson Electric Power Co., Tucson, Arizona, for the defendants-appellees.

OPINION

THOMPSON, Circuit Judge:

OVERVIEW

Appellants James Lazar and Patricia Reilly appeal the district court's approval of a $30 million settlement of a class-action suit brought against Tucson Electric Power ("Tucson"), its executive officers and directors.

Lazar contends the notice of proposed settlement was improper because it was not timely and because it failed to inform class members of what they could expect to receive from the settlement. He also contends the settlement was inadequate and the amount of attorney fees awarded to counsel for the class was excessive. He argues further that class members were improperly divided into two subclasses, that the two subclasses were wrongly determined to be entitled to different portions of the settlement fund, and that the two subclasses should have been represented by separate legal counsel. Finally, he contends his counsel is entitled to fees from the common settlement fund, because the fund will benefit from interest earned on class counsel's fee award during the pendency of this appeal.

Reilly, in addition to joining arguments made by Lazar, contends that the notice was inadequate because it failed to inform class members of the class attorneys' self-interest in settling the case. She also argues that the district court should have appointed a special master to look into the propriety of the settlement, and that the settlement hearing conducted by

the district court was a sham, because the court had previously made up its mind to approve the settlement.

We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

FACTS

The class consisted of purchasers of Tucson stock who suffered losses as a result of alleged fraud and violations of the securities laws. Under the terms of the settlement, the class was divided into two subclasses. Class members who bought stock during the class period, but after July 18, 1989, were entitled to only one-fourth the recovery allocated to members who bought stock on or before that date. The reason for this division was that on July 18, 1989 adverse information was released which caused a precipitous drop in the market price of Tucson's shares, alerting subsequent purchasers to Tucson's significant financial problems.

The source of the $30 million settlement was from Tucson's officers' and directors' liability insurance. This was the maximum amount of available insurance, and the only significant source of money to fund the settlement.

The settlement was agreed upon, subject to court approval, in late 1991. On December 11, 1991, the district court ordered that notice of the proposed settlement be sent to known class members. It also ordered publication in the Wall Street Journal and the New York Times. The December 11, 1991 order set February 6, 1992 as the last day to receive written objections and February 20, 1992 as the date for a hearing on approval of the settlement and class counsel's request for attorney fees.

The notice was published, and on January 6, 1992 it was mailed to 76,700 individual stockholders and to 277 brokerages, banks and institutions, which held shares in their street

names. All names and addresses were generated from Tucson's stockholder lists. The brokerages, banks and institutions provided Tucson with the names and addresses of 36,000 additional beneficial owners of shares. Tucson mailed the notice to these persons as their names and addresses were made known to it, the last mailing occurring on February 11, 1992.

The notice stated the aggregate amount of the proposed settlement, but it did not inform class members how they might calculate their individual shares of the settlement proceeds. The notice also advised the class that anyone who did not want to participate in the settlement could "opt out" by February 6, 1992.

The settlement hearing was held February 20, 1992. At that hearing, the district court considered objections which had been received from class members, rejected challenges to the settlement and the adequacy of the notice, approved the settlement, and awarded class counsel $7.5 million in attorney fees, which was 25% of the $30 million settlement. This appeal followed.

DISCUSSION

I

Adequacy of the Notice

Lazar and Reilly first contend that the notice of the proposed settlement failed to satisfy due process requirements because it did not contain enough information to enable individual class members to calculate what they would get out of the settlement. Lazar further argues that the notice's timing was inadequate to satisfy both due process and Federal Rule of Civil Procedure 23(c)(2).[1] Finally, Reilly argues that the

[1]Rule 23(c)(2) provides in relevant part that:

The court shall direct to the members of the class the best notice

notice was defective because it did not state class counsel's self-interest in settling the case.

We review de novo whether notice of a proposed settlement satisfies due process. *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1440 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 93 (1989). We also review de novo whether the timing of a notice satisfies Rule 23(c)(2).

A. Did the content of the notice violate due process?

In *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977), objectors to the settlement of a class action made the same argument Lazar and Reilly make here. They "argue[d] that the notice [of a proposed settlement and hearing on it] did not fairly apprise class members of their positions because it did not specify their potential recovery." *Id.* at 1177. We stated that their potential recovery was "a matter of conjecture since it was unknown how many class members would opt out or submit claims." *Id.* at 1177-78. We held that the aggregate amount of the proposed settlement and the formula for computing recoveries was all that was required. *Id.* at 1178.

[1] Here, the settlement notice states that the aggregate amount of the settlement is $30 million. It also states that each class member's recovery will be proportional to "Recognized Loss," which it defines as 100% of losses resulting from stock bought during the first period ending July 18, 1989, and 25%

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practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

Fed. R. Civ. P. 23(c)(2).

of losses resulting from stock bought during the second period. The notice clearly stated the aggregate amount of the settlement and the formula for computing awards. The notice was adequate under *Holiday Magic*. *See also In re Cement and Concrete*, 817 F.2d at 1440 ("Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.' ").

B. Did the timing of the notice violate due process or Rule 23(c)(2)?

Due process requires that notice provide affected parties with the opportunity to be heard. *In re Cement and Concrete*, 817 F.2d at 1440. Similarly, Rule 23(c)(2) requires "the best notice practicable under the circumstances." Fed. R. Civ. P. 23(c)(2).

The notice was mailed to some shareholders as late as February 11, 1992. Lazar contends that because the deadline for filing objections or opting out was February 6, 1992 and the settlement hearing was February 20, 1992, the timing of the notice was not the best practicable under the circumstances nor was it adequate. We disagree.

Tucson mailed the notice on January 6, 1992 to 76,700 shareholders at their addresses obtained from its stockholder lists. On the same day it mailed the notice to 277 brokerages, banks and institutions who held shares in their street names for the beneficial owners. These brokerages, banks and institutions responded to the mailing by providing Tucson with approximately 36,000 additional names and addresses of shareholders. Tucson mailed the notice to these shareholders as their names and addresses were received. This mailing continued through February 11, 1992. In all, the notice was mailed to approximately 113,000 shareholders. Only 20 objections were received. All were considered by the district court.

In *Holiday Magic*, we approved the timing of a notice which was mailed 26 days before the deadline for opting out of a settlement. *Holiday Magic*, 550 F.2d at 1178. While Lazar is correct in pointing out that *Holiday Magic* involved a class likely to be better informed than the class here, in *Holiday Magic*, we cited with approval *Milstein v. Werner*, 57 F.R.D. 515 (S.D.N.Y. 1972). In *Milstein*, the court approved a notice mailed 38 days before a scheduled hearing in a case similar to this, a class action by corporate shareholders. *Id.* at 518. The notice here was mailed 31 days before the deadline for written objections and 45 days before the hearing. It was mailed to 76,700 shareholders who held their shares in their individual names. As to these shareholders, we have no difficulty concluding the notice was timely.

[2] Lazar also contends the notice provided to approximately one-third of the shareholders—those who held their shares in street name—was untimely, thereby depriving a significant number of shareholders of the opportunity to object to the settlement.[2] But the question before us today is not whether some individual shareholders got adequate notice, but whether the class as a whole had notice adequate to flush out whatever objections might reasonably be raised to the settlement. If an individual shareholder later claims he did not receive adequate notice and therefore should not be bound by the settlement, he can litigate that issue on an individual basis when the settlement is raised as a bar to a lawsuit he has brought.

[3] It is important to consider the context in which the settlement was reached and its approval was sought. Tucson's

[2]Lazar and Reilly, the only objectors who have appealed the district court's approval of the settlement, were among the approximately 36,000 Tucson shareholders who held their shares in street name. Lazar and Reilly received the notice, filed objections, and opposed the settlement. In addition, Reilly participated in the settlement hearing and argued against approval of the settlement and attorney fees. Neither Lazar or Reilly elected to opt out.

position was precarious. There was a pending bankruptcy proceeding against it, and the defendants had a motion for summary judgment pending; liability had not been established and the defendants were asserting defenses which had to be taken seriously. The settlement had been achieved after lengthy negotiations among various diverse groups, including Tucson's creditors. Finally, the insurance carrier, which was to provide the $30 million to fund the settlement, had initially refused to contribute anything, and had asserted disclaimers and reservations of rights. In sum, it was critical that the settlement be presented to the district court promptly for its consideration.

[4] Altogether, the timing of the notice was not inadequate.

C. Did the notice fail to explain class counsel's self-interest in settling the case?

The notice provided that class counsel would request a fee award of 30% of the settlement, or $9 million. This was adequate notice of class counsel's interest in the settlement.

II

Adequacy of the Settlement

We review for abuse of discretion a district court's approval of a class action settlement. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir.), *cert. denied*, 113 S. Ct. 408 (1992).

A settlement should be approved if "it is fundamentally fair, adequate and reasonable." *Id.* This determination requires

> a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the

> risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Officers for Justice v. Civil Serv. Comm'n of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). This list is not exclusive and different factors may predominate in different factual contexts. *Id.*

Here one factor predominates to make clear that the district court acted within its discretion. That factor is Tucson's financial condition. At the time of the settlement it was involved in negotiations with its creditors to restructure its debt and had had an involuntary bankruptcy petition recently filed against it. It had declared a payment moratorium on its debts, and was attempting to obtain regulatory permission to raise its rates to permit it to continue operating. It reached an agreement with its other creditors at roughly the same time as the settlement in this suit was agreed upon and there was evidence that the assent of other creditors would probably have been withdrawn if this settlement had failed. This could have led to a bankruptcy reorganization which would have left little if anything for class members.

Lazar argues that Tucson's financial condition was not as bad as it was made out to be. He asserts that the evidence of Tucson's financial plight was incredible, because it was based on statements made by Tucson's counsel. This argument is meritless. The statements made by Tucson's counsel were included in his sworn affidavit, and were based upon facts within his personal knowledge. Lazar offers nothing but conclusory argument to the contrary.

Lazar also contends the district court should have rejected the settlement and let the case proceed to trial so that the

alleged wrongdoers could be put in the dock and held up to public scrutiny. This is not an adequate reason to reject a $30 million settlement and commit the class to the risks of further litigation.

Both Lazar and Reilly argue that at the time of the settlement, Tucson had its own lawsuit it was pursuing against Southern California Edison ("SCE") for interference with contract. In that lawsuit, Tucson was requesting $6.7 billion. Lazar and Reilly suggest that with such an asset, Tucson could have come up with a much larger amount to satisfy the class claims.

While it is true that recovering $6.7 billion would have changed Tucson's fortunes, the $6.7 billion was not an asset. It was a claim which was contingent on a best case result in a lawsuit. The reality of the situation was that the settlement had to be negotiated based upon assets which could be called upon to fund it. The contingent $6.7 billion claim against SCE was not such an asset. That claim was eventually settled for $40 million, but by then the settlement had been concluded and approved by the court.

In addition to Tucson's financial condition, other factors point to the conclusion that the settlement was fair. The inherent risks of litigation, the class' overwhelming positive reaction, the opinion of two sets of experienced counsel, and the cost, complexity and time of fully litigating the case all suggest that this settlement was fair.

We conclude that the district court did not abuse its discretion in approving the settlement.

III

Class Counsel's Attorney Fees

[5] We review the award of attorney fees for abuse of discretion. *Drucker v. O'Brien's Moving & Storage, Inc.*, 963

F.2d 1171, 1172 (9th Cir. 1992). In common fund cases such as this, we have established 25% of the common fund as the "benchmark" award for attorney fees. *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). This "benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six Mexican Workers*, 904 F.2d at 1311.

There are no special circumstances here which indicate that the 25% benchmark award is either too small or too large. The hours class counsel devoted to the case, when computed as a lodestar amount, total $3 million. Class counsel, however, have the case on a contingency. Moreover, it is a double contingency; first, they must prevail on the class claims, and then they must find some way to collect what they win. Class counsel was committed to carrying the case through the conclusion of litigation by trial and appeal, if that would be in the best interests of the class. The district court determined it would not be. It determined that it was in the best interests of the class to settle the case for the $30 million settlement class counsel negotiated.

The 25% contingent fee rewarded class counsel not only for the hours they had in the case to the date of the settlement, but for carrying the financial burden of the case, effectively prosecuting it and, by reason of their expert handling of the case, achieving a just settlement for the class.

[6] We cannot say the district court abused its discretion in applying the benchmark award for attorney fees.

IV

Settlement Hearing Procedures

Reilly argues that the district court behaved improperly in approving the settlement. She argues that the hearing was a sham because the district judge had provisionally decided to approve the settlement. She also argues that the district court violated its "fiduciary duty" to the class by not appointing a special master to investigate the propriety of the settlement. We reject these arguments.

There is nothing in the record to suggest that the district court prejudged the question whether to approve the settlement. To the contrary, the record shows that the district court received and considered objections filed by the few shareholders who objected to the settlement, and listened to the objections of those who chose to appear and argue at the hearing. Only after carefully reviewing all of the objections and considering relevant matters pertaining to the fairness of the settlement did the district court approve it.

The court was under no obligation to appoint a special master to investigate the propriety of the settlement. The court was in a position to judge the merits of the settlement based upon its familiarity with the case and the evidence presented to it. There were no procedural errors in the district court's conduct of the settlement hearing.

V

Disparate Treatment of the Two Classes

Lazar argues that the disparate treatment of the two subclasses was irrational and that they should have been separately represented.

A. Was the disparate treatment irrational?

Lazar contends it was irrational to select July 18, 1989 as the date to divide the class, because those stockholders who bought their shares after that date bought them at a better price to book value ratio. He argues that these purchasers invested more wisely when they bought their shares, and as a result they should share equally with those who bought their shares on or before July 18, 1989. This argument lacks merit. The reason stockholders were treated differently depending on whether they bought their shares after July 18, 1989, had nothing to do with what they thought about Tucson's book value. The reason for treating the two subclasses differently was based on events that began to unfold on July 18, 1989.

On that date, Tucson announced the resignation of Einar Greve, its chairman and CEO. It also announced it was considering a cut in the size of its dividend. Standard and Poors lowered Tucson's credit rating. On July 19, 1989, the market reacted. The stock price dropped from $33.50 per share to $27 per share. These events, and particularly the market reaction of a one-day drop of $6.50 in the price of the shares, would necessarily have put investors on notice that Tucson was in financial trouble, just as the district court found. Those who bought their shares on or before the dividing date were more likely to have bought in reliance on market values inflated due to the alleged wrongdoing of Tucson's responsible officers and directors.

It was not irrational to use the July 18, 1989 date to divide the class into two subclasses.

B. Should the two subclasses have been separately represented by legal counsel?

Lazar argues that the subclasses should have been separately represented due to an inherent conflict of interest. He points out that in dividing up the $30 million common fund,

the claims of members who bought their shares on or before July 18, 1989 would be computed based on 100% of their losses, while the claims of members who bought after that date would be computed on 25% of their losses. Separate counsel, Lazar contends, should have represented each subclass to assure that the July 18, 1989 date was an appropriate date to divide the class, and that the allocation of 100% of losses to the first group and 25% to the second was fair. Lazar further contends that the district court erred in not providing a reasoned explanation why separate representation for the two subclasses was unnecessary.

[7] The district court did not directly address the separate representation question, but in finding the settlement fair, adequate and reasonable the court implicitly found that representation was adequate. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284 (9th Cir.), *cert. denied*, 113 S. Ct. 408 (1992) (citing *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1337, 1340 (5th Cir. 1981)). Here, notice of the settlement was given to 113,000 class members. Only twenty objections were filed.[3] Only Lazar and Reilly have appealed, and even they have not opted out of the settlement.

These circumstances suggest that the appellants are spoilers. Their concerns could have been addressed in their individual lawsuits if they had elected to opt out of the settlement. As we said in *Holiday Magic*,

> [a]ppellants were not forced into the position of having to predict their interests would be adequately represented. They could determine whether there had been adequate representation of their interests by

[3]We cannot tell from the record before us how many shareholders may have received notice after the time for filing objections had expired. As we have previously stated, however, given all of the circumstances of this case, the timing of the notice was not inadequate. *See supra*, pages 12398-12399.

> reviewing the terms of the settlement. If they were dissatisfied, they could opt out of the class. This opportunity to opt out after knowing the terms of a proposed settlement is unusual in the class action context and serves to protect the interests of class members. *See Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971). Appellants' rights were fully protected by this right to opt out.

Holiday Magic, 550 F.2d at 1177.

Lazar relies on *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976). He argues that *Mandujano* compels us to reverse the district court's approval of the settlement, because the district court did not give an express, detailed response to the objections. *Id.* at 836. We disagree.

[8] Initially we note that *Mandujano* was a class action prosecuted under Federal Rule of Civil Procedure 23(b)(2), with no opportunity for class members to opt out; class members here had that chance, because this class action was prosecuted under Federal Rule of Civil Procedure 23(c)(2)(A). As *Holiday Magic* makes clear, the opportunity to opt out can alleviate our concern about potential class conflict. *See Holiday Magic*, 550 F.2d at 1177.

Moreover, in *Holiday Magic*, we considered the *Mandujano* requirement of a detailed response to objections, and found it inapplicable. *Holiday Magic*, 550 F.2d at 1179. In *Mandujano*, we had serious concerns about the fairness of the settlement to some classes of plaintiffs, *Mandujano*, 541 F.2d at 836, and more than one-half of the representative plaintiffs were on record as opposing the settlement. *Id.* at 837. That was not the case in *Holiday Magic*; and it is not the case here. What we said in *Holiday Magic* applies to this case: "We believe that the failure of the district court to give detailed responses to appellants' objections does not call for throwing out a settlement in a complicated lawsuit for a class

of more than 31,000 people." *Holiday Magic, Inc.*, 550 F.2d at 1179. This case involves a class of approximately 113,000 people.

VI

Fees for Lazar's Counsel

Finally, Lazar argues that his counsel is entitled to 25% of the amount by which interest accruing during this appeal increases the value of the settlement. He acknowledges that interest on the $22.5 million which is the class' share of the settlement is compensation for the time delay the class has experienced in receiving payment. However, by order of the district court, interest on the $7.5 million attorney fees awarded class counsel also accrues to the class. Thus, interest accrues to the benefit of the class during the pendency of this appeal in a way greater than simply compensating the class for the delay in receiving its share of the settlement proceeds.

We reject Lazar's argument. The benefit to the class from interest it will earn on class counsel's attorney fee award is not the kind of benefit which will support an award of fees to Lazar's counsel. None of the cases Lazar relies on involved an award of fees merely because a delay caused interest to accrue. *See White v. Auerbach*, 500 F.2d 822, 829-30 (2d Cir. 1974); *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1053 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973). In *Alpine Pharmacy*, the court used accrued interest to justify an attorney fee award, but it did so because the lawyers who were rewarded had *created* the arrangement under which one class received all the interest on certain settlement funds, not because they merely caused delay allowing interest to accrue under a preexisting arrangement. *Id.*

Were we to grant Lazar's request for fees for the reason he suggests, we would encourage appeals for no purpose other than to delay the finality of litigation. We will not do that.

AFFIRMED.

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CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY
DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE TUCSON ELECTRIC POWER COMPANY SECURITIES LITIGATION

This Document Relates to:

All cases

CIV. 89-1274 PHX WPC

FINAL JUDGMENT AND ORDER OF DISMISSAL

Assigned to the Honorable William P. Copple, U. S. District Judge

This matter having come before the Court on the application of the parties for approval of the settlement set forth in the Stipulation of Settlement dated Oct 30, 1991 and the exhibits annexed thereto (the "Stipulation") relating to the above-captioned Class Actions and Derivative Suit, and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed in the premises and good cause appearing thereof, it is this 20 day of Feb, 1992:

ORDERED, ADJUDGED AND DECREED THAT:

1. For purposes of this Final Judgment, the Court adopts and incorporates the definitions in the Stipulation.

2. This Court has jurisdiction over the subject matter of this litigation, and all actions within this litigation and over all parties to this litigation, including all members of the Settlement Class.

3. This Court hereby decrees that neither the Stipulation, nor this Judgment, nor the fact of the settlement are an admission or concession by any Class or Individual Defendant of any liability or wrongdoing whatsoever. This judgment is not a finding of the validity or invalidity of any claims in the Class Actions or Derivative Suit of any wrongdoing by any of the defendants named therein. Neither the Stipulation, nor this judgment, nor the fact of settlement , nor the settlement proceedings, nor the settlement negotiations, nor any related documents shall be used or construed as an admission, concession, presumption or inference against any party in any proceeding other than such proceedings as may be necessary to consummate or enforce the Stipulation and the Settlement.

4. This Court hereby approves the settlement set forth in the Stipulation and finds that said settlement is, in all respects, fair, reasonable and adequate to the Settlement Class, Current Shareholders of TEP and TEP in accordance with Rules 23, 23.1 and 54 of the Federal Rules of Civil Procedure, and directs implementation of all its terms and provisions.

5. The Settlement Class, as defined in the Stipulation, consists of: All persons and entities who purchased TEP common

stock during the period from and including March 23, 1987, through and including January 25, 1991, and who were injured thereby except defendants, TEP's present and former officers and directors, members of their immediate families, and their legal representatives, heirs, successors and assigns, and any subsidiary or affiliate of TEP.

6. This Court hereby dismisses on the merits and with prejudice the complaints in the Class Actions and each of the Settled Class Claims (as defined in Paragraph 1 of the Stipulation), against each and all of TEP and the Individual Class Defendants (as defined in Paragraph 1 of the Stipulation) and without costs to any of the settling parties as against the other.

7. This Court hereby dismisses on the merits and with prejudice the complaint in the Derivative Suit and each of the Settled Derivative Claims (as defined in Paragraph 1 of the Stipulation), against each and all of TEP and the Individual Derivative Defendants (as defined in Paragraph 1 of the Stipulation) and without costs or attorneys' fees to any of the settling parties as against each other, except as provided in paragraph 14 below.

8. All parties and entities who are members of the Settlement Class, all Current Shareholders of TEP, and TEP are hereby forever barred and enjoined from asserting either directly or indirectly, against any or all of TEP or the Individual Class Defendants or Derivative Defendants or other Releases any claim,

demand, right, liability, suit or cause of action constituting, related to, in connection with or arising out of the Settled Class Claims, Settled Derivative Claims or the settlement thereof which any member of the Settlement Class, Current Shareholder or TEP had, has or may have in the future against TEP, Einar Greve, Joe G. Coykendall, Sam G. Minter, Thomas C. Weir, J. Luther Davis, Kathryn N. Dusenberry, Peter D. Herder, John P. Schaefer, H. Wilson Sundt, Kenneth L. Saul and Joseph B. Wilcox and the other Releasees.

9. Each and all of Tucson Electric Power Company, Einar Greve, Joe G. Coykendall, Sam G. Minter, Thomas C. Weir, J. Luther Davis, Kathryn N. Dusenberry, Peter D. Herder, John P. Schaefer, H. Wilson Sundt, Kenneth L. Saul and Joseph B. Wilcox, and their parents, subsidiaries, affiliates, predecessors, successors, and assigns, their past and present partners, principals, officers, directors, employees, agents, attorneys, accountants, auditors, investment bankers, representatives, heirs, executors, trustees, administrators and immediate family members are hereby and forever released and discharged from any manner of actions, causes of action, suits, claims, demands, obligations, debts, agreements, promises, liabilities, controversies, damages, losses, attorneys' fees, costs or expenses of any kind whatsoever, in law and in equity, based on federal or state law, foreseen or unforeseen, matured or unmatured, known or unknown, accrued or not accrued, suspected or unsuspected, fixed or contingent, controlled or

hidden, that are based upon, related to arising from or connected with the Settled Class Claims and the Settled Derivative Claims.

10. The Class Notice given to the Settlement Class of the settlement set forth in the Stipulation and the other matters set forth therein was the best notice practicable under the circumstances, including the individual notice to all members of the Settlement Class who could be identified through reasonable effort. Said Class Notice fully and accurately informed members of the Settlement Class of all material elements of the Class Actions and the proposed settlement, and provided due and adequate notice of those proceedings and of the matters set forth therein to all persons entitled to such notice. Said Class Notice fully satisfied the requirements of Rule 23(c)(2) and 23(e) of the Federal Rules of Civil Procedure, and the United States Constitution.

11. The Derivative Notice given to TEP Current Shareholders fully and accurately informed TEP Current Shareholders of all material elements of this derivative litigation and the proposed settlement, and constituted valid, due and sufficient notice to all TEP Current Shareholder, complying fully with Rule 23.1 of the Federal Rules of Civil Procedure and the United States Constitution.

12. Without affecting the finality of this judgment in any way, this Court hereby retains continuing jurisdiction over: (a) implementation of this settlement and any distribution to members

of the Settlement Class, pursuant to further orders of this Court; (b) disposition of the Gross Settlement Fund; (c) the Class Actions and the Derivative Suit for the purpose of hearing and determining applications for plaintiffs' attorneys' fees, costs, expenses, including expert fees and interest; (d) the Class Actions and the Derivative Suit until the final judgment contemplated hereby has become effective and each and every act agreed to be performed by the parties shall have been performed pursuant to the Stipulation of Settlement; and (e) all parties to the Class Actions and the Derivative Suit for the purpose of enforcing and administering the Stipulation.

13. In the event that the settlement does not become effective in accordance with the terms of the Stipulation of Settlement, then this judgment shall be rendered null and void and be vacated and the Stipulation and all orders entered in connection therewith by this Court shall be rendered null and void.

14. A separate order shall be entered approving an award of attorneys' fees and expenses for counsel for Plaintiffs. That order shall not disturb or affect any terms of this Final Judgment of Dismissal, and defendants shall not be responsible for these fees and expenses.

15. The Court finds that no just reason exists for delay in entering final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure in accordance with the Stipulation. Accordingly, the Clerk is hereby directed forthwith to enter this

Final Judgment of Dismissal of Class Actions pursuant to Rule 54(b).

Dated: Phoenix, Arizona

Feb 20, 1992

United States District Judge

X FILED ___ LODGED
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FEB 24 1992
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE TUCSON ELECTRIC POWER
COMPANY SECURITIES LITIGATION,

This Document Relates to: No. CIV. 89-1274 PHX WPC

All cases ORDER RE: ATTORNEY'S FEES

This matter having come before the Court upon the application of plaintiff's counsel for approval of attorneys' fees and the Court having reviewed the documents in support of and in objection to the request and the Court having held a hearing on February 20, 1992 concerning the request,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1) Plaintiffs' counsel are awarded fees of SEVEN MILLION FIVE HUNDRED THOUSAND DOLLARS ($7,500,000) without interest. This is the total amount of fees the Court deems reasonable under the circumstances. Furthermore, plaintiffs' counsel waived any claim of interest when they sought a flat $9,000,000, rather than a percentage of the fund, with its

corresponding accrued interest. See, Declaration of Counsel, pp. 3-5 (filed Feb. 18, 1992).

2) All objections to the attorneys' fees are denied;

3) The Court finds that no just reason exists for delay in entering final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Accordingly, the Clerk is hereby directed forthwith to enter this Order pursuant to Rule 54(b).

DATED this 21 day of February, 1992.

William P. Copple
United States District Judge

Filed December 10, 1993

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN V. TORRISI, No. 92-15550

Plaintiff-Appellee,

and D.C. No. CV-89-01274-WPC

James Lazar,

Objector-Appellant,

v.

TUCSON ELECTRIC POWER COMPANY, et al.,

Defendant-Appellee.

In re: TUCSON ELECTRIC COMPANY SECURITIES LITIGATION.

JOHN V. TORRISI, No. 92-15556

Plaintiff-Appellee,

and D.C. No. CV-89-01274-WPC

JAMES LAZAR,

Objector-Appellant,

v.

TUCSON ELECTRIC POWER COMPANY, et al.,

Defendants-Appellees.

In re: TUCSON ELECTRIC COMPANY SECURITIES LITIGATION.

JOHN V. TORRISI,

Plaintiff-Appellee,

and

PATRICIA REILLY,

Plaintiff-Appellant,

v.

TUCSON ELECTRIC POWER COMPANY; THOMAS WEIR, et al.,

Defendants-Appellees.

No. 92-15557

D.C. No. CV-89-01274-WPC

ORDER

Before: KOZINSKI, THOMPSON and T.G. NELSON, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The petition for rehearing and suggestion for rehearing banc were circulated to the full court and no timely request for en banc rehearing was made by any active judge.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

RELEVANT PORTIONS OF:

NOTICE OF PENDENCY AND PROPOSED SETTLEMENT OF CLASS ACTIONS AND SETTLEMENT HEARINGS THEREON

(For the complete ***NOTICE*** refer to U.S. District Court docket entry, #194, dated 12/11/91.)

"DECISION TO SETTLE AND BENEFITS OF SETTLEMENT

"11. Counsel for the Class Plaintiffs include several law firms with extensive and particular expertise and experience in the prosecution of securities class action. Based on their factual and legal investigation of the claims and defenses in these actions and their familiarity with other similar actions, counsel have concluded that the proposed Settlement of the Class Actions is fair, just and reasonable and is in the best interests of the Settlement Class. Counsel for the Class Plaintiffs have made a thorough investigation into the facts and circumstances relevant to the allegations in the Class Actions. In connection with that investigation, they have conducted extensive discovery.

"12. In evaluating the Settlement, counsel for the Class Plaintiffs have considered the expense and length of continued proceedings necessary to prosecute the Class Actions against the Class Defendants through trial and through appeals. Counsel for Class Plaintiffs also have taken account the inability of the Class Defendants to pay a substantially larger judgment, the financial condition of TEP, the availability of insurance, the uncertain

outcome and the risk of any litigation, especially in complex actions such as here, as well as the difficulties and delay inherent in litigation. Counsel for Class Plaintiffs believe that the Settlement of the Class Actions described in this Notice **confers substantial benefits to the Settlement Class and each of its members** (sic), without the substantial additional cost, uncertainty and delay that would result if the Class Actions were to proceed against the Class Defendants through trial and appeal. Based upon these considerations, Class Plaintiffs and their counsel have concluded that it is in the best interests of Class Plaintiffs and the Settlement Class to settle these actions on the terms set forth herein."

TUCSON ELECTRIC POWER SECURITIES LITIGATION
ATTORNEYS' FEES AND DISBURSEMENTS
(SUMMARY SHEET)

(For the entire request of legal fees by plaintiffs' attorneys refer to U.S. District Court docket entries #197 and #199, dated 2/18/92.)

FEDERAL COURT CLASS ACTION:	HOURS	TIME	EXPENSES
Abbey & Ellis	2,089.75	$652,463.75	$148,327.23
Milberg Weiss Bershad Specthrie & Lerach	1,579.75	$424,197.50	$55,897.82
Berger & Montague, P.C.	1,302.80	$296,559.50	$20,419.53
Richard Appleby, Esq.	92.00	$29,900.00	
Barrack, Rodos & Baccine	353.75	$88,145.00	$4,835.38
Berman DeValerio & Pease	131.00	$26,531.00	$2,478.70
Bernstein Litowitz Berger & Grossman	334.25	$86,445.00	$6,367.31
David B. Gold, Esq.	156.75	$33,270.00	$2,208.73
Goodkind Labaton Rudoff & Sucharow	469.80	$125,972.00	$11,537.72
Harvey Greenfield, Esq.	81.50	$40,612.50	$5,455.97
Greenfield & Chimicles	380.50	$102,312.50	$5,650.88
Gross & Metzger	92.25	$23,171.25	$5,014.58
Alvin J. Ivers, P.C.	55.40	$11,080.00	$2,150.00
North & Barron	137.30	$20,907.05	$3,737.20
O'Connor, Cavanagh, Anderson Westover, Killingsworth & Beshears	212.20	$35,215.50	$766.24
I. Stephen Rabin, Esq.	14.00	$5,150.00	$51.40

	HOURS	TIME	EXPENSES
Savett, Frutkin, Podell & Ryan	56.90	$15,171.00	$2,801.29
Schiffrin & Craig	55.50	$15,617.50	$423.40
Simon & Campbell, P.C.	8.25	$1,408.75	
Strauss & Troy	104.10	$22,282.00	$3,226.43
Curtis V. Trinko	109.10	$23,155.00	$4,182.20
Wolf Popper Ross Wolf & Jones	283.20	$86,462.00	$3,992.75
Zlotnick & Thomas	154.25	$34,625.00	$4,043.91
Zwerling, Schachter & Zwerling	61.70	$16,261.00	$1,151.85
	8,316.00	$2,216,914.80	$294,720.52
FEDERAL DERIVATIVE ACTION			
Bonnett, Fairbourn & Friedman	47.40	$9,126.00	$1,311.31
Lowey Dannenberg Bemporad Brachtl & Selinger	186.25	$53,861.25	$1,123.03
Stull, Stull & Brody	177.50	$60,312.50	$1,538.07
Wolf Haldenstein Adler Freeman	402.00	$140,739.50	$7,414.59
	813.45	$264,039.25	$11,387.00
STATE CLASS ACTION			
Hartunian, Futterman & Howard, Chtd.	236.50	$54,721.75	$5,815.64
Kaufman Malchman Kaufmann & Kirby	744.75	$236,618.75	$25,847.52
	981.25	$291,340.50	$31,663.16

	HOURS	TIME	EXPENSES
STATE DERIVATIVE ACTION			
Leonard, Felker, Altfield, Nix & Krigbaum, P.C.	39.95	$3,769.50	$182.75
Meredith & Cohen, P.C.	136.00	$29,506.25	$1,534.92
Much Shelist Freed Denenberg & Ament, P.C.	45.90	$13,036.50	$122.00
Sears & Goodman, P.C.	30.00	$4,405.00	$382.05
Wechsler Skirnick Harwood	378.65	$122,112.00	$4,806.75
Halebian & Feffer	630.50	$172,829.25	$7,028.47
TOTAL	10,741.20	$2,945,123.80	$344,799.15

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(3)

Supreme Court, U.S.
FILED
MAY 26 1994
OFFICE OF THE CLERK

No. 93-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PATRICIA REILLY,

Petitioner,

vs.

ABBEY & ELLIS, et al., and
TUCSON ELECTRIC POWER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS JOHN V. TORRISI, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 93-1697

IN THE

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OCTOBER TERM, 1993

PATRICIA REILLY,

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VS.

ABBEY & ELLIS, et al., and
TUCSON ELECTRIC POWER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS JOHN V. TORRISI, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents John V. Torrisi, et al. ("plaintiffs-respondents")[1] respectfully submit this brief in opposition to the petition for a writ of certiorari of Patricia Reilly in this action.

[1] Pursuant to Rule 24.1, the parties to this proceeding in the United States Court of Appeals for the Ninth Circuit were John V. Torrisi, plaintiff-appellee; James Lazar and Patricia Reilly, objector-appellants; and Tucson Electric Power Company, Thomas C. Weir, Sam G. Minter, Joseph B. Wilcox, Kenneth L. Saul, and J. Luther Davis, defendants-appellees.

Although Patricia Reilly's petition to this Court lists Abbey & Ellis and numerous other law firms as respondents, those law firms were *not* parties

(Footnote continued)

STATEMENT OF JURISDICTION

Petitioner purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

A. Introduction

Petitioner Reilly has not – and cannot – set forth any cogent reasons why her petition for certiorari should be granted in this case. The so-called "notice" issue presented for plenary review simply does not present an unsettled question of federal law. The Court of Appeals decision below is not in conflict with any decision of this Court or of any Court of Appeals; in fact, it is entirely consistent with other Courts of Appeals' decisions. As shown herein, the Court of Appeals' decision was correct and this case does not present any special or important reasons for granting certiorari.

Petitioner's *ad hominem* attacks on plaintiffs' counsel reflect petitioner's perceived personal grievances regarding issues which are not properly before this Court. Such attacks are unworthy of the traditions of this Court and are belied completely by the record in this matter. Most of petitioner's statement of the case and argument contains inaccurate factual averments, improper inferences and references to facts outside the record. An analysis of the uncontroverted facts in the record shows that there is no basis for this petition and certiorari should be denied.

B. Background Of The Case

The consolidated federal court class actions, the settlement of which is challenged by the petitioner, were commenced in

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to the proceedings below. Those law firms were counsel to John V. Torrisi and the other plaintiffs-appellees in this action. We respectfully request that the Court correct the erroneous caption used by petitioner to reflect that "John V. Torrisi, et al." rather than "Abbey & Ellis, et al." are the proper respondents.

the Spring and Summer of 1989 against Tucson Electric Power Company ("TEP" or the "Company") and certain of its officers and directors. The actions were brought on behalf of purchasers of TEP common stock. The events which precipitated the lawsuits were the resignation of the Company's Chairman and Chief Executive Officer under a cloud of allegations that he improperly sold TEP common stock on the basis of inside information, public disclosure of the Company's worsening financial condition, TEP's statement that it was considering cutting its dividend and the precipitous drop in the market price of TEP common stock. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1373, 1377 (9th Cir. 1993). Generally, plaintiffs alleged that defendants violated the federal securities laws by misrepresenting the financial condition of TEP and that as a result the market price of TEP common stock was artificially inflated and plaintiffs and the members of the Class were damaged by reason of their purchases of TEP common stock at artificially inflated prices.

After these actions were filed, TEP's financial condition continued to deteriorate. TEP ultimately eliminated its stock dividends. By 1991, TEP declared a moratorium on debt payments, was negotiating with creditors to restructure its debt and had an involuntary petition in bankruptcy filed against it. *Id.* at 1376. At the same time, TEP was seeking a rate increase from the regulators at the Arizona Corporations Commission. *Id.*

Against this backdrop of impending financial doom, plaintiffs negotiated the $30 million settlement at issue in this petition. The settlement was the product of months of hard fought negotiations. As the Court of Appeals found, this settlement was fair, reasonable and adequate standing on its own and in light of the circumstances under which it was negotiated.

First, the Court of Appeals noted that the $30 million "was the maximum amount of available insurance, and the only significant source of money to fund the settlement." *Id.* at 1373.[2]

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[2] The record supports the conclusion that the Company could not contribute either cash or equity to the settlement because its creditors would not permit

(Footnote continued)

Second, TEP's financial condition was precarious and this settlement was critical to a reorganization of the Company outside of Chapter 11. *Id.* at 1376. If a settlement was not reached, it was likely that TEP would have filed for bankruptcy, "which would have left little if anything for class members." *Id.*

Third, defendants had a motion for summary judgment pending at the time the settlement was reached. Plaintiffs had not established liability and "the defendants were asserting defenses which had to be taken seriously." *Id.* at 1375.

C. The Notice And Settlement Hearing

On December 11, 1991 the District Court entered an Order authorizing notice of the proposed settlement to be mailed to known class members (the "Notice") and that a summary notice of the proposed settlement be published in the *Wall Street Journal* and *The New York Times*. *Id.* at 1373. That same Order also scheduled a hearing for February 20, 1992 to consider whether to approve the proposed settlement and class counsel's request for attorneys' fees.

Pursuant to that Order, on January 6, 1992 a copy of the Notice was mailed to 76,700 individual stockholders and to 277 brokerage firms, banks and institutions which held shares in their street names. *Id.* An additional 36,000 notices were mailed to beneficial owners of shares held in street name by the brokerage firms, banks and institutions. *Id.* A summary notice also was published in the national and international editions of the *Wall Street Journal* and *The New York Times*. Ultimately over 113,000 Notices were mailed. *Id.*

The Notice that was sent to class members described the litigation, summarized the terms of the $30 million settlement and set forth the formula that would be used for determining what each Class member who filed a valid proof of claim would

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it to do so and that the net worth of the individual defendants was insubstantial in light of the potential damages. Moreover, the insurers had raised substantial defenses to any payment under the policies. *Id.* at 1375.

receive from the settlement fund. The Notice explained in full the basis for plaintiffs' counsel's decision to settle the case including TEP's precarious financial condition, the risk and expense of further litigation, and the defenses raised by TEP. In this regard, the Notice specifically stated:

> Counsel for class plaintiffs believe that the settlement of the class actions described in this notice confers substantial benefits to the settlement class and each of its members, without the additional cost, uncertainty, and delay that would result if the class actions were to proceed against the class defendants through trial and appeal.

Lastly, the Notice advised class members that they had the right to opt out of the class, that they could object to the proposed settlement as well as plaintiffs' counsel's application for attorneys' fees and that they had the opportunity to review more detailed papers in the case and speak with plaintiffs' counsel.

At the settlement hearing on February 20, 1992, the District Court carefully considered and eventually rejected the arguments raised in each of the 20 objections to the proposed settlement. The District Court permitted all class members to be heard at the hearing irrespective of their failure to file written objections and accepted for consideration belated written objections, thus obviating any possible claim of prejudice to class members.[3]

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[3] Petitioner is in error in arguing that the District Court entered its final judgment and order of dismissal approving the settlement prior to the settlement hearing (Petition at 9). As is the regular practice in many courts, class counsel filed a proposed form of order with the Clerk of the Court prior to the settlement hearing. The District Court did not sign the final judgment and order of dismissal until all of the objectors were heard, as is evident by the signature page of the Order. (Petition at 27a). As set forth by the Court of Appeals:

> . . .The record shows that the District Court received and considered objections filed by the few shareholders who rejected the settlement, and listened to the objections of those who chose to

(Footnote continued)

The District Court approved the settlement as fair, reasonable and adequate after considering carefully TEP's precarious financial condition, the effect of a bankruptcy on class members' claims, the limited assets available to satisfy a judgment or fund a settlement despite plaintiffs' efforts to obtain an equity contribution from TEP, the fact that market losses are not an accurate measure of damages on a Rule 10b-5 claim and the availability of an opt-out right to all class members.

In connection with plaintiffs' counsel's application for an award of attorneys' fees equal to 30% of the settlement fund, the District Court considered the result achieved, the hourly rates charged, plaintiffs' counsel's specialized experience in class action cases and that class counsel had performed commendably in promptly settling the litigation in getting whatever assets were available from an "almost bankrupt utility." Following the Ninth Circuit's standard in common fund cases, the District Court reduced the requested fees from 30% to 25% of the fund obtained for the class and declined to award any interest on the fees.

D. The Decision of the Court of Appeals

The Ninth Circuit affirmed the District Court's approval of the settlement and its order awarding attorneys' fees. Among other things, the Ninth Circuit held that the Notice sent to class members was adequate and that the content of the Notice did not violate due process, that the timing of the Notice did not violate due process or Rule 23, that the settlement was fair, reasonable and adequate under Rule 23, that the award of attorneys' fees to class counsel was fair and reasonable, that the settlement hearing procedures were proper and that the creation of two subclasses was appropriate.

With respect to the notice issue raised in this petition, the Court of Appeals found that the content of the Notice sent to

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appear and argue at the hearing. Only after carefully reviewing all of the objections and considering relevant matters pertaining to the fairness of the settlement did the District Court approve it. *Id.* at 1377.

class members did not violate due process. Specifically, the Court found that the settlement Notice stated that the aggregate amount of the settlement was $30 million, that each class member's recovery will be proportional and that the Notice properly described the formula for computing each Class member's share of the settlement fund. In holding that this Notice was adequate, the Court of Appeals stated:

> In *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977), objectors to the settlement of a class action made the same argument Lazar and Reilly make here. They "argue[d] that the notice [of a proposed settlement and hearing on it] did not fairly apprise class members of their positions because it did not specify their potential recovery." *Id.* at 1177. We stated that their potential recovery was "a matter of conjecture since it was unknown how many class members would opt-out or submit claims." *Id.* at 1177-78. We held that the aggregate amount of the proposed settlement and the formula for computing recoveries was all that was required. *Id.* at 1178.

Id. at 1374.

As shown herein, that holding was correct and the petition for certiorari should be denied.

REASONS FOR DENYING THE PETITION

The instant petition does not satisfy the standards for accepting plenary review. Rule 10 of this Court's Rules provides in pertinent part that certiorari shall be granted "only when there are special and important reasons therefor" — for example, when a decision of a Court of Appeals is in conflict with a decision of this Court or another Court of Appeals, or when a Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. None of these circumstances exist in this case.

Petitioner argues that the due process rights of the Class were violated because the Notice did not quantify the recovery that

Class members would receive from the aggregate settlement and because the Notice somehow misled class members that they would receive a "substantial" percentage of their market losses. These issues are based on an inaccurate view of the record, and in any event, do not provide a basis for granting certiorari. There is no conflict among the Circuits and the petition does not raise a novel question of law.

A. The Court Of Appeals' Decision Is Not In Conflict With Any Decision Of This Court Or Of Any Other Court Of Appeals

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), this Court held that the requirements of due process were satisfied if the notice in a class action was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974).

Consistent with this decision, the Ninth Circuit, citing its prior opinion in *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977), held that the Notice in this case satisfied all due process requirements in that it fully described the terms of the settlement, permitted Class members an opportunity to be heard, permitted class members an opportunity to opt out of the Class, specifically stated that the aggregate amount of the settlement was $30 million, and fully described that each Class member's recovery from the aggregate settlement would be proportional based upon a formula for calculating settlement distributions. The fact that each Class member was not given an estimate of what their recovery would be simply does not raise due process concerns.

The other courts that have considered this issue are in accord. *See, e.g., Weinberger v. Kendrick*, 698 F.2d 61, 69-71 and n.11 (2nd Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (Judge Friendly rejected numerous challenges to a securities settlement notice that was substantially similar in scope to the one here, including a challenge that the notice was defective "because it

did not state what proportion of the class's total loss the settlement fund represented."); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir.), *cert. denied*, 456 U.S. 998 (1981) (notice of settlement was satisfactory even though it failed to provide an estimated range of recovery per unit); *Grunin v. International House of Pancakes*, 513 F.2d 114, 122-23 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); *In re Equity Funding Corp. of American Securities Litigation*, 603 F.2d 1353, 1361-62 (9th Cir. 1979) (notice does not have to disclose range of potential offsets applied against any recovery since it was obvious that the value of this offset would fall with a range of between zero and full value); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 637 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981), *Cannon v. Texas Gulf Sulfur Co.*, 55 F.R.D. 308, 313 n.2 (S.D.N.Y. 1972); *Bennett v. Behring Corp.*, 96 F.R.D. 343 (S.D. Fla. 1982) (notice only required to advise Class members of general parameters of settlement, not the details).

Accordingly, there is no conflict among the Courts on what constitutes adequate notice in the context of a class action and the Notice at issue here complied with all of the requirements of due process. A class settlement notice may "consist of a very general description of the proposed settlement." *Grunin*, 513 F.2d at 122; accord, *Weinberger*, 698 F.2d at 70. "Class members are not expected to rely on the notices as a complete source of settlement information." *Grunin*, 513 F.2d at 122.

Moreover, the premise of petitioners' argument — that the recovery each Class member will get from the settlement fund is ascertainable at the time the notice is sent — is in error. The fact is the amount of each Class member's recovery need not (and indeed cannot) be set forth in the notice because the amount of each individual's recovery from the settlement is dependent upon the number of valid claims filed, the "recognized losses" realized by the Class members who filed valid claims and the number of Class members who choose to opt out of the Class. *See Weinberger*, 698 F.2d at 70 and n.11. The formula for determining proportional recovery of each Class member was set forth in full in the Notice at issue in this case.

As indicated above, the courts are uniform in holding that no more is required.

Moreover, it would be seriously misleading to compare the settlement to some estimate of "market losses" for the Class in the notice because doing so would misinform Class members about the strength and size of their claims. Under the anti-fraud provisions of the federal securities laws, an investor may recover as damages only that portion of his stock market loss that is caused by the alleged misrepresentation or nondisclosure. Price declines due to market forces or factors other than those misrepresented or concealed may not be recovered, unless rescissory damages are warranted. *See, e.g., Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 155-56 (1972), (holding that damages for violations of Section 10(b) were determined by the "out of pocket measure of damages" which is based upon the difference between the "fair value" of the stock absent any violations of Section 10(b) and the consideration paid). *See also Blackie v. Barrack*, 524 F.2d 891, 919 n.25 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335 (9th Cir. 1976); *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 637 F.2d 77 (2d Cir. 1980) and *Rolf v. Blyth Eastman Dillon & Co., Inc.*, 570 F.2d 38, 49 and n.22 (2nd Cir. 1978) (describing certain offsets applied to reduce market losses in computing damages). Since damages and market losses cannot be equated, it would be highly misleading to suggest otherwise. A class notice should not include misleading information about potential recoveries. *See Oswald v. McGarr*, 620 F.2d 1190, 1198-99 (7th Cir. 1980).

In sum, the Ninth Circuit held that the Notice in this case satisfied all relevant due process requirements. Other federal courts that have considered this and similar issues are in accord. Petitioner has not identified any contrary authorities. Under these circumstances, there is no basis for granting the petition for certiorari since there is no conflict with decisions of this Court or other circuits and petitioner has presented no novel question of law. *See Braxton v. United States*, 500 U.S. 344, (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the Circuit Courts of Appeal

and state courts concerning the meaning of provisions of federal law."); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

B. The Notice Properly Informed Class Members About The Settlement And This Case Does Not Present Special Or Important Reasons For Granting Certiorari

As noted above, the Court of Appeals held that the Notice in this action fully and properly described the terms of the settlement and the rights of Class members thereunder. Petitioner mistakenly argues that she and other Class members were promised that they would recover a substantial amount of their losses if they approved the settlement. Very simply, no such representation was made.

As noted above (p. 5), the Notice simply stated that "Counsel for class plaintiffs believe that the settlement of the class actions described in this Notice confers substantial benefits to the settlement class and each of its members. . . ."[4] By any objective standard, $30 million is a substantial benefit, particularly here in light of the Company's financial difficulties. However, it takes a great leap of faith to turn this statement into a promise that Class members would recover a substantial portion of their market losses from the settlement. The petitioner's argument is based on tortured reasoning and unreasonable inferences. The Notice clearly did not promise class members that they would recover a substantial portion of their market losses. Petitioner's contrary erroneous argument does not present special or important reasons for granting certiorari.

The question of what the Notice said or did not say and the inferences to be drawn therefrom presents a factual dispute, at best, and such a dispute does not provide a basis for granting certiorari. It is well settled that "[a]n issue of fact is not 'important' for purposes of Rule 10. Normally the Court will not grant

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[4] Petitioner repeatedly misquotes the notice by italicizing, bolding and underlining the language of the Notice without acknowledging to the Court that the emphasis is supplied by petitioner.

certiorari to review a decision that turns solely upon an analysis of facts, or to determine whether the evidence supports a judgment of a District Court . . . as to such issues, the Courts of Appeals are generally the courts of last resort." 13 J. Moore, H. Bendix, B. Ringle and K. Shirey, *Moore's Federal Practice*, § 10.41 at S.C. 10-47 (2d. Ed. 1993) (citing *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951)).

Lastly, the adequacy of the Notice at issue in this petition is demonstrated by Class members' responses in this case. The objections of petitioner and other Class members were considered fully by the District Court. Class members were fully informed about their rights under the settlement — their right to exclude themselves from the Class or object to the terms of the settlement. Indeed, if petitioner truly wanted to bring TEP's officers and directors to "public scrutiny" and to seek "some funds from the actual pockets of the individual officers and directors," she had every right to do so on her own. In fact, the Court of Appeals recognized that the circumstances at hand suggest that petitioner is merely a "spoiler" whose concerns could have been addressed in an individual lawsuit had she elected to opt out of the settlement. *Torrisi*, 8 F.3d at 1378. The thousands of Class members who support this settlement should not suffer on account of petitioner's misunderstanding of the notice and her unrealistic, personal gripes.

CONCLUSION

Petitioner has used the petition as a stage from which to broadcast her perceived grievances with this settlement and with class actions generally. Petitioner's personal views, however, do not give rise to circumstances warranting granting certiorari. Given that there is no conflict in the lower courts on any legal issues raised by petitioner and given that petitioner merely challenges the Ninth Circuit's decision to uphold the District Court's findings that this settlement is fair, reasonable and adequate and that the Notice was proper, this case is clearly not worthy of this Court's attention.

For the foregoing reasons, the Court should not grant the petition for a writ of certiorari.

Dated: New York, New York
May 26, 1994

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No. 93-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PATRICIA REILLY,

Petitioner,

vs.

ABBEY & ELLIS, ET AL.,
TUCSON ELECTRIC POWER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT TUCSON ELECTRIC POWER COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Tucson Electric Power Company ("TEP" or the "Company")[1] submits this brief in opposition to the petition for a writ of certiorari.[2]

[1] Respondent Tucson Electric Power Company represents that it has no parent company, and its subsidiaries are all wholly-owned. *See* U.S. Sup. Ct. Rule 24.1, 28 U.S.C. (Supp. 1994).

[2] The parties to this proceeding in the United States Court of Appeals for the Ninth Circuit were John V. Torrisi, plaintiff-appellee; James Lazar and Patricia Reilly, objector-appellants; and Tucson Electric Power Company, Thomas C. Weir, Sam G. Minter, Joseph B. Wilcox, Kenneth L. Saul, and J. Luther Davis, defendants-appellees. *See* U.S. Sup. Ct. Rule 24.1, 28 U.S.C. (Supp. 1994).

(Footnote continued)

STATEMENT OF JURISDICTION

Petitioner purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

COUNTER-STATEMENT OF THE CASE

A. Proceedings in the Courts Below

Petitioner Reilly's statement of the case contains numerous factual errors, improper inferences, and references to testimony and figures never presented to the courts below. Pursuant to Rule 15.1 of the Rules of this Court, TEP presents this counter-statement of the case based on the undisputed facts in the record.

This case arose from sixteen shareholder class actions and derivative suits filed against Tucson Electric Power Company and certain of its former officers and directors in the District Court for the District of Arizona and in the Arizona state courts. In November 1989, the federal class and derivative cases were consolidated, and were closely coordinated for pre-trial purposes with the state court class and derivative cases. The class action plaintiffs complained essentially that they purchased the Company's stock at artificially inflated levels over a long period as a result of defendants' misrepresentations about the Company's financial condition and prospects. The class and derivative plaintiffs also claimed that several of the Company's officers and directors engaged in misconduct that injured the Company and its stockholders.

More than two years after the initial action was commenced, and while defendants' motion for summary judgment in the federal class actions was pending, the parties agreed to a proposed $30 million settlement of all the class actions and derivative suits. Notice of the proposed settlement was given by publication and mailing to an estimated 113,000 class members

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Although Patricia Reilly's petition to this Court lists as parties Abbey & Ellis and numerous other law firms for the plaintiffs-appellees, those law firms were *not* parties to the proceedings below.

and current TEP stockholders, and a full hearing was held by the federal district court on February 20, 1992 to consider both the settlement and the request by plaintiffs' counsel for attorneys' fees. Only twenty class members filed written comments or objections, and several of those objectors (including Petitioner Reilly) participated at the hearing. (Reilly App. 6a - 7a, 9a.)[3]

After reviewing the written objections and hearing oral argument, the district court entered a final judgment and order on February 21, 1992 that approved the $30 million settlement and dismissed the federal class actions and derivative suit against all defendants with prejudice.[4] By order entered February 24, 1992, the district court awarded $7.5 million in attorneys' fees to plaintiffs' counsel for creating the $30 million settlement fund.[5] (Reilly App. 7a, 14a - 15a, 21a - 29a.)

Two of the shareholder objectors — James Lazar and Petitioner Reilly — appealed from the judgment and orders of the district court. Both objectors challenged, among other things, the adequacy of the notice of the settlement. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, holding *inter alia* that adequate notice of the content of the proposed settlement had been given to the class. The court referred to the two objectors as "spoilers" whose "concerns could have been addressed in their individual lawsuits if they had elected to opt out of the settlement." (Reilly App. 5a - 20a.)

B. The Significance of TEP's Precarious Financial Condition

Tucson Electric Power Company is a public utility providing electricity to the city of Tucson, Arizona and surrounding areas.

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[3] References to the Appendix to the Petition of Patricia Reilly are cited in this brief as "Reilly App. __."

[4] The settlement of the state class action and derivative suits was also approved by the Arizona state court. No appeal was taken from that approval.

[5] By Order entered March 25, 1992, the district court denied the request of plaintiffs' counsel for the interest accruing on the portion of the settlement fund awarded to them. (Reilly App. 28a - 29a.)

In 1989, TEP began experiencing serious, widely-reported financial problems. Those problems became so severe that, by early 1991, the Company declared a moratorium on its debt payments and certain other financial obligations, and commenced negotiations to restructure its finances. Those negotiations involved its creditors, lease participants, and major suppliers — all of whom had claims far superior to those of plaintiffs — as well as its regulators at the Arizona Corporation Commission ("ACC") and the Federal Energy Regulatory Commission ("FERC"). Settlement of this litigation became a significant part of that restructuring effort. (Reilly App. 12a.)

In October 1991, after an involuntary petition in bankruptcy had been filed against TEP, the plaintiffs agreed in principle to resolve this litigation subject to court approval. The ACC then approved new electric rates for the Company, expressly conditioned on the Company's restructuring its obligations outside of Chapter 11 and withdrawal or dismissal of the involuntary bankruptcy petition by December 31. Restructuring of TEP's debt was completed shortly thereafter, when the Company's creditors agreed to substantially compromise their claims and to receive approximately 50% of the Company's common stock on a fully diluted basis after the restructuring. Ultimately, this complicated restructuring transaction was approved by the Company's existing preferred and common stockholders, as well as the ACC, the FERC, and the bankruptcy court. (Reilly App. 12a.)

Settlement of these lawsuits was closely related to that restructuring. If settlement had not occurred, the restructuring could have fallen apart, and TEP could have been forced into bankruptcy, which would have jeopardized the opportunity for TEP shareholders to recover anything on their claims. (Reilly App. 12a.)

C. The Adequacy of the Contents of the Notice

To obtain approval of the settlement, the Company sent detailed notices to an estimated 113,000 of its former and current shareholders, and also published notice in the *Wall Street Journal*

and *The New York Times*. The notice sent directly to the class shareholders described the litigation and the class, and explained the decision of plaintiffs' counsel to settle the case based on TEP's financial condition, the risk and expense of further litigation, and the defenses raised by TEP. As part of that explanation, the notice stated "counsel for class plaintiffs believe that the Settlement of the Class Actions described in this Notice confers substantial benefits to the Settlement Class and each of its members, without the additional cost, uncertainty, and delay that would result if the Class Actions were to proceed against the class defendants through trial and appeal." (Reilly App. 7a, 8a, 17a, 32a.)

The notice to the class went on to summarize the terms of the settlement, including the $30 million aggregate fund and the formula for allocating the fund among the various shareholders. The notice further advised of the shareholders' right to "opt out" of the class, the court hearing on the settlement and the application for attorneys fees, and the opportunity to review more detailed papers and to speak with plaintiffs' counsel. (Reilly App. 7a, 8a, 17a.)

REASONS FOR DENYING THE WRIT

I. PETITIONER REILLY HAS NOT STATED ADEQUATE REASONS FOR GRANTING HER PETITION.

Petitioner Reilly does not dispute that the settlement of this case for $30 million was fair, adequate and reasonable under the circumstances, particularly given TEP's precarious financial condition. Reilly also does not dispute that she and the class had full notice of the terms of the aggregate $30 million settlement and the formula for allocating that aggregate amount among shareholders. Finally, Reilly readily concedes that she and the class had full opportunity to investigate the settlement's terms, to attend the court hearing and object to those terms, or to "opt out" of the class if the terms were inadequate.

Reilly's only argument in her petition is that the class was deprived of due process because the notice did not advise shareholders of the specific amount they would each receive from

the aggregate settlement, and that shareholders were misled into thinking that they would each recover a "substantial" percentage of their total losses.

This claim does not state a legitimate reason for granting Reilly's petition for certiorari, because it neither identifies a conflict among the circuits, nor does it raise a novel question of law. *See* U.S. Sup. Ct. Rule 10, 28 U.S.C. (Supp. 1994). This Court has already determined that notice of a class action meets due process requirements if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974). The lower courts have uniformly interpreted this standard to be met in class action settlements if the notice includes the general parameters of the settlement and permits class members an opportunity to investigate and be heard, even if it does not include details with respect to each individual class member's recovery. *See, e.g., Great Northern Packaging v. Pleasure Homes, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195 (5th Cir. 1981) (notice of settlement was satisfactory even though it failed to provide an estimated range of recovery per unit); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977) (aggregate amount of proposed settlement and formula for computing recoveries was all that due process required); *Bennett v. Behring Corp.*, 96 F.R.D. 343 (S.D. Fla. 1982), *aff'd*, 737 F.2d 982 (11th Cir. 1984) (notice only required to advise class members of general parameters of settlement, not the details).

As the Ninth Circuit held, the notice in this case fully met this well-established standard (Reilly App. at 8a - 9a), and Petitioner has not identified any case law supporting her theory that this well-established standard does not comply with due process.

II. THE CLASS NOTICE WAS ADEQUATE AND FULLY DISCLOSED ALL AVAILABLE INFORMATION.

Even if Reilly had presented a proper issue for certiorari, her petition would still fail on the merits.

Reilly argues that the notice misled shareholders by suggesting that they would each receive a "substantial" portion of their "losses." This is incorrect. The notice simply states that, in the opinion of plaintiffs' counsel, a $30 million settlement offers substantial benefits to the class and its members under the circumstances here, which involved a company on the verge of bankruptcy and shareholder claims that were subject to a motion for summary judgment by defendants. The notice does not attempt to compare the $30 million settlement with the total losses allegedly caused by TEP's misconduct, nor does it suggest in any way that when the $30 million was allocated it would provide shareholders with a substantial portion of the losses they each allegedly suffered as a result of TEP's misconduct.

Reilly also contends that the notice should have advised shareholders exactly what percentage of their total losses they would receive from the aggregate settlement. But such notice was not only impossible but also unnecessary for several reasons.

First, there was considerable dispute during the litigation over the total losses recoverable by the class. (TEP's motion for summary judgment argued, among other things, that market forces – not TEP's alleged misconduct – caused the substantial percentage of the drop in the stock price complained of by TEP shareholders.) That issue was not resolved by the settlement, which was based more on TEP's precarious financial condition than any firm estimate of total recoverable losses, and thus it would have been misleading to TEP's shareholders for plaintiffs' counsel to speculate in the notice on those losses. Although one of plaintiffs' counsel apparently told Reilly, in response to her question, that plaintiffs could have claimed total losses ranging between $200,000,000 and $400,000,000 had this case gone to trial, those figures were not based upon any damage study prepared during the litigation, and they apparently assumed that plaintiffs could recover for the total drop in TEP's

stock price over an extended period, which TEP vigorously disputed and was prepared to rebut.

Second, the notice could not possibly identify the amount or percentage of each individual shareholder's recovery, because that would depend on the individual circumstances of each shareholder, which was unknowable until they submitted proofs of claim after the settlement was approved.[6] More significantly, the amount each shareholder receives will depend upon the number of shareholders who submit a "proof of claim," because an individual's proportionate share of the aggregate amount could vary dramatically if a large number of shareholders either "opted out" of the class or declined to submit proofs of claim. (Reilly App. 7a.) Although Petitioner claims that it is common knowledge that settlements in these types of cases only result in shareholders recovering 5% to 10% of their total losses, citing information that was not in the record below, that generalization would not necessarily apply here, and it would have been misleading to report that range of recovery without some firm basis.

Third, and perhaps most fundamentally, Reilly's own experience in this case demonstrates conclusively how the notice was fully adequate, and how further information was unnecessary. Based on the notice, Reilly had the opportunity to investigate on the issue of what her individual recovery would be, and she took advantage of that opportunity. Based on what she learned, Reilly also had the opportunity to object to the settlement in open court, or to opt out if she so desired. Due process requires no more. *See Mullane v. Central Hanover Bank & Trust*, *supra*, 339 U.S. at 314.

Petitioner further speculates that if the class notice had contained additional information, shareholders in this case might have disapproved the settlement, and "required that the defrauding officers and directors be actually held accountable."

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[6] Each individual shareholder's losses would depend on a variety of factors, including the price they paid for the stock, the amount they sold it for (if they sold), and their ability to supply valid evidence of their purchase.

(Reilly Pet. at 21.) However, the facts show that the settlement of this case was reached after defendants had moved for summary judgment that would have absolved them of all liability, and was intertwined with a much broader restructuring of TEP's finances that was designed to avoid bankruptcy for TEP. If the shareholders had disapproved the settlement simply to pursue claims against the individual officers and directors, they would have lost the opportunity to access the $30 million settlement, and would have been left with nothing if the summary judgment motion was granted or if their action had upset the restructuring and thrown TEP into bankruptcy. *See* 11 U.S.C. § 510(b). Faced with that choice, shareholders clearly had no incentive to disapprove the settlement.

Finally, Petitioner Reilly's suggestion that officers and directors "pay nothing" in this case is incorrect. The $30 million settlement was funded by the officers' and directors' insurance policy, which of course is specifically designed to indemnify them for exactly the sort of misconduct alleged in this case. Although Petitioner Reilly may wish that the officers and directors were held more accountable, vengeance is not a valid reason to deprive the entire class of a reasonable settlement and to expose the class to the risk they would receive nothing.

CONCLUSION

For all the foregoing reasons, Petitioner Reilly's petition for a writ of certiorari should be denied.

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